Vol 312

FILED
JUN 27 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 187

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
MARTIN E. BLUM,
LEONARD J. STERN,
Counsel for Petitioners.

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PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Justices of The Supreme Court of the United States:

Frank G. Rath, individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, et al., respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Ohio, 136 Ohio St. 352, rendered March 6, 1940, reversing a decree of the Ohio Court of Appeals and affirming a decree of the Court of Common Pleas of Cuyahoga County.

A.

Summary Statement of Matter Involved.

Frank G. Rath and the other petitioners are members and officers of the Joint Executive Board of the Hotel and Restaurant Employees' International Alliance, affiliated with the American Federation of Labor. This association is composed of members of Waiters' Union, Local No. 106, Waitresses' Union, Local No. 107, and Cooks' Union, Local No. 167 (R. 177). The membership is composed entirely of citizens residing and working in the City of Cleveland, Ohio, and its environs (R. 342, 354-355, 397).

Pearl E. Crosby is the owner and operator of a restaurant in the City of Cleveland, Ohio (R. 280-281).

In August, 1937, two representatives of the petitioners called upon Mrs. Pearl E. Crosby in an effort to discuss with her the employment of members of the petitioners' labor union in her place of business. This she refused to do (R. 397, 398, 399, 400).

On October 4, 1937, the petitioners proceeded to patrol in front of employer's restaurant, carrying banners containing the following language:

> "Crosby's Restaurant unfair to organized labor. Please do not patronize. Cooks' and Waitresses' Union, affiliated with A. F. of L." (R. 6).

On October 11, 1937, a temporary consent decree was entered into, permitting two pickets in front and one in the rear of plaintiff's place of business (R. 7).

On January 27, 1938, the Court of Common Pleas of Cuyahoga County heard the case on its merits and issued an injunction prohibiting picketing (R. 20-21). The case was heard *de novo* by the Ohio Court of Appeals, and the decree was reversed so as to permit peaceful picketing

(R. 421-423). The Supreme Court of Ohio sustained a motion to certify filed by the appellee, Crosby, herein and by a majority opinion sustained the Trial court's decree prohibiting picketing in any manner whatsoever.

Your petitioners resisted the claim of the employer for an injunction on the ground that the decree of the Trial court, sustained by the Court of Last Resort in Ohio, was repugnant to the XIVth Amendment to the Constitution of the United States, in that it deprived petitioners of the right of freedom of speech and assemblage. The court, by entering the decree, deprived petitioners of the protection of the due-process clause of said amendment.

B.

Statement as to Jurisdiction.

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344 (b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925.)

The decree of the Supreme Court of Ohio was rendered March 6, 1940 (R. 445). Application for rehearing, timely filed, was denied March 27, 1940 (R. 446).

In sustaining the decree of the trial court, the Supreme Court of Ohio was divided 5 to 2. The majority premised its conclusion on the ground that no "legitimate trade dispute" existed, because there was no quarrel between plaintiff and plaintiff's employees. Accordingly, with respect to the Federal question of free speech, it adopted the following language from the case of *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308:

> "The right to contract, the right to do business, and the right to labor freely and without restraint, are all

constitutional rights, equally sacred, *and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business* * * *'' (Emphasis supplied) (R. 433).

Judge Day dissented from the majority specifically on the Federal question. He said:

> ''Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech'' (R. 434).

Similarly, Judge Zimmerman, in his dissenting opinion, said:

> ''The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of 'peaceful picketing', * * * would constitute an infringement of the constitutional guarantee of free speech. *Senn* v. *Tile Layers' Protective Union, supra,* (301 U. S. 468, 478, 81 L. Ed. 1229, 1236, 57 Supreme Ct. 857) * * *'' (R. 439).

The following cases are believed to sustain jurisdiction:

Thornhill v. *Alabama,* 84 L. Ed. (Adv.) 659;

Carlson v. *California,* 84 L. Ed. (Adv.) 668;

Manhattan Life Insurance Co. v. *Cohen,* 243 U. S. 123, 134;

Cumberland Coal Co. v. *Board of Revision,* 284 U. S. 23, 24;

Schneider v. *New Jersey,* 308 U. S. 147, and cases therein cited in footnote 8;

Near v. *Minnesota,* 283 U. S. 697.

C.

The Question Presented.

Does the decree of the Supreme Court of Ohio, sustaining the decree of the trial court, which forbids all picketing, peaceful or otherwise, abridge the right of freedom of speech and of the press guaranteed by the XIVth Amendment to the United States Constitution?

D.

Reasons Relied On for the Allowance of the Writ.

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Supreme Court of Ohio is in direct conflict with the decisions of this Court in *Thornhill* v. *Alabama,* 84 L. Ed. (Adv.) 659; *Carlson* v. *California,* 84 L. Ed. (Adv.) 668; *Senn* v. *Tile Layers' Protective Union,* 301 U. S. 468; *American Steel Foundries* v. *Tri-City Trade Council,* 257 U. S. 186.

2. The precise question of whether the guarantee of free speech, under the XIVth Amendment to the Federal Constitution, precludes a State Equity Court from enjoining peaceful picketing by members of a labor union has not heretofore been decided by this Court. The same question has been raised by the decisions of the Illinois Supreme Court in *American Federation of Labor* v. *Swing,* 22 N. E. (2d) 857, and *Milk Wagon Drivers' Union of Chicago, Local 753, et al.* v. *Meadowmoor Dairies, Inc.,* 371 Ill. 377, 21 N. E. (2d) 308. This Court granted certiorari to review those cases on May 20, 1940, and June 3, 1940, respectively.

3. The case involves in its essential features the question of whether a State court may, by the simple device of finding that the facts in a particular case do not amount to a "legitimate trade dispute", circumvent the protection of the XIVth Amendment, as pronounced in *Thornhill* v. *Alabama*, 84 L. Ed. (Adv.) 659, and *Carlson* v. *California*, 84 L. Ed. (Adv.) 668. Obviously, therefore, a decision on this question is of transcendent and vital importance to all labor organizations throughout the country. The decision of the Supreme Court of Ohio precipitates an anomalous situation wherein courts could, in the absence of statutes, impose restrictions on labor unions, which, under the doctrine of the *Thornhill* and *Carlson* cases, they are, in spite of existing statutes, constitutionally forbidden to impose.

Prayer for Writ.

WHEREFORE your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of Ohio, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled No. 27639, Crosby, Appellant *v.* Rath et al., Appellees, and that the decree of the Supreme Court of Ohio may be reviewed by this Honorable Court and that your petitioner may hav such other and further relief in the premises as to thi- Honorable Court may seem meet and just; and your petitioner will ever pray.

JOSEPH A. PADWAY,
MARTIN E. BLUM,
LEONARD J. STERN,
Counsel for Petitioners.

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PEARL E. CROSBY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinion of the Court Below.

The opinion of the Supreme Court of Ohio is reported in 136 Ohio State 352.

B.

Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b), (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The Federal Question.

The opinion of the Ohio Supreme Court shows clearly that the court passed upon the claim that an injunction restraining peaceful picketing violates the rights of free speech guaranteed by the Federal Constitution. As noted above, the majority opinion adopted the following language from the case of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308:

> "The right to contract, the right to do business, and the right to labor freely and without restraint, are all constitutional rights, equally sacred, *and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business* * * *." (Emphasis supplied.)

Judge Day dissented squarely on the issue of the constitutional right of free speech. His opinion states:

> "Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech."

The dissenting opinion of Judge Zinnmerman also discloses the fact that the Court considered and passed upon the constitutional question of free speech. He said:

> "* * * The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of 'peaceful picketing', reasonably exercised on a peaceable basis, would constitute an infringement of the constitutional guarantee of free speech."

On this state of the record, the Federal question was properly presented and raised.

Petitioners contend that since the record *conclusively* shows that the Supreme Court of Ohio *considered* and *decided* the Federal question, i. e., the rights of the petitioners to free speech under the United States Constitution and the amendments thereto, it *necessarily* follows that this Court has jurisdiction to entertain the petition for certiorari.

The rule of law formulated by the decisions of this Court applicable to the situation in the case at bar is:

If the highest court of the State in which decision could be had expressly passes upon the Federal claim, it is immaterial to inquire how or when the Federal claim was raised.

The following cases sustain this Court's jurisdiction:

Manhattan Life Insurance Co. v. *Cohen,* 243 U. S. 123 at 134 (1914);

Cumberland Coal Co. v. *Board of Revision,* 284 U. S. 23 at 24 (1931);

Home Insurance Co. v. *Dick,* 281 U. S. 397 at 407 (1930);

Hill v. *Smith,* 260 U. S. 592 at 594 (1923);

People ex rel. Bryant v. *Zimmerman,* 278 U. S. 63 at 68 (1928);

Chicago, R. I. & P. R. R. v. *Perry,* 259 U. S. 548 at 551 (1922);

Cissna v. *Tennessee,* 246 U. S. 289 at 294 (1918);

Mallinckrodt v. *State of Mississippi,* 238 U. S. 41 at 49 (1915);

Grannis v. *Ordean,* 234 U. S. 385 at 392 (1914);

State ex rel. Anderson v. *Brand,* 303 U. S. 95 at 98 (1938).

C.

Statement of the Case.

A summary statement of the case appears under the heading "A" in the Petition for Writ of Certiorari and, in the interest of brevity, is incorporated here by reference. A more extended statement appears in the argument that follows.

D.

Specification of Errors.

1. The Supreme Court of Ohio erred in failing to hold that the rights of the petitioners to free speech, under the XIVth Amendment to the United States Constitution, permitted them to give information to the public regarding their union grievances against the employer, by carrying banners and placards on the public highways.

2. The Supreme Court of Ohio erred in failing to hold that the rights of the petitioners to free speech, under the XIVth Amendment to the Constitution of the United States, prevented State authorities from destroying their constitutional rights by characterizing them as unlawful activities.

3. The Supreme Court of Ohio erred in sustaining that portion of the trial court's decree which reads as follows:

> "1. * * * from picketing, bannering or patroling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business.
>
> "3. From inducing or attempting to induce any customer, prospective customer or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted or otherwise, or from any other act or thing

with the intent, purpose or effect of injuring the plaintiff's business and from threatening to do so."

E.

ARGUMENT.

I.

Freedom of Speech Guaranteed by the Constitution.

The denial of the right to tell the truth is in direct violation of the rights protected by the XIVth Amendment.

This Court has on several occasions said that this fundamental constitutional guarantee cannot be abridged if asserted peacefully for the protection of those fostering lawful enterprises. In the very recent case of *Thornhill* v. *Alabama*, 84 L. Ed. (Adv.) 659, this Court said, Syllabus I:

> "Freedom of speech and of the press, which are secured by the First Amendment against abridgement by the United States, are among the fundamental personal rights and liberties secured to all persons by the XIVth Amendment against abridgement by a state."

In the *dictum* on page 666 of the above case, Mr. Justice Murphy made this very significant statement:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162-63. *See Senn* v. *Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as

yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478):

" 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' "

In *Carlson* v. *California,* 84 L. Ed. (Adv.) 668, it was decided:

"The constitutional right of free speech secured against state invasion by the XIVth Amendment is abridged by a county ordinance against it, without qualification, unlawful to carry or display any banner in the vicinity of any works, factory, place of business or employment for the purpose of influencing or attempting to influence any person to refrain from entering therein * * * or from performing any service or labor therein."

On page 667 of the above case, this Court said:

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

In *C. I. O.* v. *Hague,* 59 S. Ct. 985, it was stated:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the XIVth Amendment."

See also:

Schneider v. *State,* 308 U. S. 147;
Senn v. *Tile Layers,* 301 U. S. 468;
Herndon v. *Lowry,* 301 U. S. 242;
DeJonge v. *Oregon,* 299 U. S. 353;
Schenk v. *United States,* 249 U. S. 47.

II.

A Legitimate Trade Dispute Exists Between the Employer and Labor Unions.

The Supreme Court of Ohio in its majority opinion held that

> "The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute;" (*Crosby* v. *Rath,* 136 Ohio State at 354);

and concluded that there was no such dispute.

Plainly, this conclusion cannot defeat petitioners' constitutionally protected right of free speech. A State court cannot foreclose this Court from independently inquiring into the facts and making its own conclusions, when necessary for the protection of Federal rights.

As stated in *Norris* v. *Alabama,* 294 U. S. 587, at 590:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied

> in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

See also *Great Northern Railway* v. *Washington*, 300 U. S. 154, 165.

This Court has on numerous occasions developed the concept of a "legitimate trade dispute." The undisputed facts in the instant case clearly come within the concept so developed. The employer herein does not hire union labor (R. 287). She pays her employees lower wages than the prevailing union scale in the community for the same or similar services (R. 316-317). It logically follows, therefore, that the wages she pays, and the conditions under which her employees work, have an effect on the entire industry by which the members of the labor unions earn their livelihood in the pursuit of their employment. *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 186.

The fact that petitioners do not stand in a proximate employee relationship to the respondent employer is of no relevance whatever. It is a fundamental right of the petitioners to extend unionization throughout the industry, to induce all employers to employ members of petitioners' union. As strikingly stated by this Court in the recent case of *Apex Hosiery Co.* v. *William Leader and American Federation of Full-Fashioned Hosiery Workers, Philadelphia, Branch No. 1, Local No. 706* (Decided May 27, 1940):

> "Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v.

Tri-City Central Trades Council, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

The action of the employer in failing to hire union labor has an effect on the entire restaurant industry in the City of Cleveland. This principle was stated by this Court in *Thornhill* v. *Alabama,* 84 L. Ed. (Adv.) 659, on pages 666 and 667:

> "* * * the practices in a single factory may have economic repercussions upon a whole region and effect widespread systems of marketing."

On page 66 of this case, this Court laid down the principle that:

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned."

In *Exchange Bakery Company* v. *Rifkin,* 245 N. Y. 260, on page 263:

> "It (labor union) may be interested in the wages of those not its members or in the conditions under which they work as in its own members because of the influence of the one upon the other. All engaged in a trade are affected by the prevailing rate of wages; all by the principle of collective bargaining. Economic organization today is not based upon a single shop."

In the locality where the petitioners commenced picketing on October 4, 1937, the prevailing rule of law controlling therein was in *S. A. Clarke Lunch Company* v. *Waiters' Local,* 22 Ohio Appellate 265, Syllabus 3:

> "Where restaurant refused labor union's proposal that it employ union labor, it cannot enjoin, as unlawful

> boycott, peaceful distribution of cards by labor union asking public not to patronize unfair place."

(This opinion has not been reversed, distinguished or modified by the Supreme Court of Ohio.)

We submit that there exists a genuine dispute between the employer, who, within her legal rights, rejected the proposals of the petitioners. She employed persons of her own choosing. The employer's action in rejecting the petitioners' proposal brought into existence the petitioners' right to influence the patronage of persons affiliated with and sympathetic to the organized labor movement.

III.

Employer's Claims Cannot Defeat Petitioners' Right of Free Speech.

The employer has claimed and will claim that the right of free speech ought to be wholly denied to the petitioners for the reason that it was shown at the hearing that acts of violence occurred.

The reading of the record and the finding by each court that heard this case does not disclose that *any member of the labor union,* whether party defendant or not in the hearing of the case, either directly or indirectly authorized, participated in or ratified any act of violence that was claimed to have been committed. The Supreme Court of Ohio in its majority opinion did not find that the petitioners were in any manner guilty of the violence. On this score we cite to the Court, Judge Zimmerman's dissenting opinion, *Crosby* v. *Rath,* 136 Ohio State 352, at 358 and 359:

> "Acts of violence perpetrated against Mrs. Crosby, her employees and customers are mentioned in the majority opinion. It is to be borne in mind that these occurred prior to the issuance of the injunction by the

> Court of Common Pleas, that the defendants disclaim responsibility therefor, and that there is a lack of evidence implicating them."

The issuance of a decree against labor unions, enjoining peaceful picketing because violence occurred, though unproven, violates the lawful purpose of the organized labor union, and is an unwarranted penalty. In Frankfurter and Greene, "The Labor Injunction", on page 33, it is stated:

> "Unwittingly a court may be pronouncing judgment upon the implications of a label instead of weighing the elements of an industrial conflict as it actually transpired."

But even assuming *arguendo* that there had been some prior acts of violence in this case, there is still no legal justification for denying petitioners' right peacefully to picket. The decisions clearly indicate this.

In the case of *Iron Molders Union* v. *Allis Chalmers Company*, 166 Fed. 45 (C. C. A. 7, 1908), the Circuit Court of Appeals for the Seventh Circuit separated lawful acts from the unlawful acts, stating as follows:

> "And consequently the parts of the decree which prohibit the use of persuasion and picketing can be justified only on the basis that such means are not to be lawfully applied in a genuine struggle of labor to obtain better terms and conditions; for surely men are not to be denied the right to pursue a legitimate end in a legitimate way simply because they may have overstepped the mark and trespassed on the rights of their adversary. A barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask." (166 Fed. at 49.)

Accordingly, the Court held that prohibition of persuasion and picketing as such should not be included in the decree.

In the case of *Fenske Brothers* v. *Upholsterers' Union*, 358 Ill. 239, 193 N. E. 112 (1934), the Illinois Supreme Court had previously held that:

> "The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion. There was therefore no basis for restraining the displaying of placards, and it was error to have done it." (358 Illinois at page 260; 193 N. E. at 121.)

To the same effect and substance, see *People* v. *Young*, 188 Ill. App. 208, at 212, 213 (1914); *Henrici Company* v. *Alexander*, 198 Ill. App. 568.

The same rule is adopted in separating lawful from unlawful acts occurring on a picket line in the case of *Wise Shoe Company* v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749 at 750 (1935), where the New York Court of Appeals enjoined acts of violence but refused to enjoin peaceable picketing, i. e., peaceable persuasion.

In the case of *Warner* v. *Lilly Co.*, 265 U. S. 526 (1924) at page 532, this Court held that in an unfair competition case the defendant should not be enjoined from doing lawful acts in the future (such as using chocolate in his quinine preparation) simply because prior to that time the defendant has committed unlawful acts, i. e., attempting to infringe upon plaintiff's product.

In the case of *Borderland Coal Company* v. *Gasway*, 278 Fed. 56 (1921), the Circuit Court of Appeals for the Seventh Circuit held that, simply because the Union had committed certain unlawful acts such as violence and the like, it would not be restrained from doing lawful acts in the future, such as attempting to unionize the coal districts in which the plaintiff corporations are located.

In addition, the individual petitioners cannot be deprived of their constitutional rights to free speech as the result of "unlawful acts of violence" by irresponsible and author-

ized third persons. This Court has recently had occasion to point out that there is every reasonable presumption against the loss of fundamental constitutional rights by waiver. *Johnson* v. *Zerbst*, 304 U. S. 458 at 464 (1938).

See also,

Cinderella Theatre v. *Sign Writers' Union*, 6 Fed. Supp. 164;

Kentucky Diamond Coal Co. v. *Mine Workers*, 188 Ky. 477;

Boiler & Engine Co. v. *Benner*, 14 Ohio Decisions 357.

Surely, where, as here, the record fails to disclose any responsibility on the part of unions for the prior acts of violence, such unions should not be punished therefor by being denied a constitutional right upon which the whole labor movement depends for its very existence.

The employer claims and will claim that she has certain contracts of employment with her several employees and that she would, therefore, be prohibited from entering into any contract with the labor unions. It is significant to note that she has been in business for a period of more than nine years and that at no time was any employee under contract (R. 78-123). Picketing under limitation of judicial order commenced October 11, 1937 (temporary consent decree filed in Court of Common Pleas of Cuyahoga County, Ohio, on said date.) No employee was under contract. However, more than one and one-half months of such picketing continued before the employer entered into these purported "agreements" (R. 417). These written instruments are nothing more than a recitation of the minimum wage regulations of the State of Ohio, with a three month tenure of employment. Under these so-called "agreements" the employees gain nothing. 41 Harvard Law Review, 754:

> "The interest of labor to better itself in respect to conditions, hours and wages, and by some courts even

> the strengthening of the labor union itself for the accomplishment of these ends, are embraced within the privileges of inducing breach of contract."

We insist, therefore, that these "contracts" cannot be employed by Mrs. Crosby to defeat the lawful purpose of the petitioners.

The employer claims and will claim that it is immaterial to her whether or not any of her employees belong to the labor unions. We maintain that, in the interest of fair dealing, it is unreasonable for her to employ language of indifference and then proceed to thwart the lawful activities of the petitioners.

> "While Mrs. Crosby declares she is not antagonistic toward union labor and has no objection to her employees becoming union members, the record contains instances tending to belie such statements. Particular reference is made to the reaction initially displayed to the suggestion of unionization and the tactics subsequently adopted; to the treatment of a union waitress working for a time at the Crosby restaurant, and to the development when a union organizer attempted to approach the restaurant cooks, who had evinced a friendliness to his overtures." (Dissenting opinion by Judge Zimmerman, *Crosby* v. *Rath,* 136 Ohio State 363.)

We maintain, that regardless of what rights she may claim her rights are not superior to the right of free speech under which the petitioners claim protection, and if in conflict with petitioners' right her rights may not be exercised so as to effect a total destruction of petitioners' right of free speech and assemblage.

F.

Summary and Conclusion.

We have undertaken to show that the Supreme Court of Ohio, in denying to the labor unions the right to picket

peacefully, failed to grant to the labor unions the inalienable right to tell the truth. The truth is that the employer does not hire union labor. It is our contention that we have the right so to notify the public.

Your petitioners submit, therefore, that the relief prayed should be granted and that the decision of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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(8625)

FILED
DEC 12 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 187.

FRANK G. RATH,
Individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, *et al.*,
Petitioners,

vs.

PEARL E. CROSBY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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THE GOTCH LEGAL PUBLISHING CO., CLEVELAND, OHIO

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vs.

PEARL E. CROSBY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

I.

STATEMENT OF THE CASE.

Petitioners' "Summary Statement Of Matter Involved" omits many important facts found by the Supreme Court of Ohio. (R. 430.) Hence we make a rapid summary of the facts, documented by specific reference to the record.

(a) Respondent, Her Business, and Her Employees.

Respondent conducts a restaurant in Cleveland, Ohio, in which she has invested about $35,000.00 (R. 282), and for which she has built up a valuable trade and good will. (R. 283.) She employs approximately forty-five employees in all departments and many of them have been with her almost since the time she opened her restaurant about eleven years ago. (R. 283.)

None of the respondent's employees is a member of any union (R. 40), and none of them desires to become a member of any union or of petitioners' unions. (R. 122, 130, 272.) In fact, respondent's colored cook testified that in 1933 he tried to join Cooks' Union No. 167 and was refused admission because of his color and that of forty or fifty colored cooks and three or four hundred colored waiters in Cleveland he knew of none that belonged to the unions. (R. 47, 48.)

There was no evidence whatever that the respondent had been anti-union in the conduct of her business. She made no inquiries of her employees as to union affiliation and made no such inquiries of applicants for work. (R. 284.) There was no evidence that any person had ever been refused employment by her because of union membership or that anyone had ever been discharged because of such membership. Respondent's relations with her employees have always been amicable and free from controversy. (R. 294.) There is no restaurant in the respondent's neighborhood similar to the respondent's where members of the petitioners' unions are employed and which is in competition with respondent's restaurant. (R. 412, 413.)

(b) The Demands of the Petitioners.

In August and September, 1937 the petitioners' unions demanded that respondent sign a closed union shop agreement with them. (R. 287, 288.) She inquired whether the petitioners' unions were authorized to represent any of her employees and they answered in the negative. The petitioners insisted, however, that respondent either force her employees to become members of their unions or that she discharge them and hire union members in their places. This the respondent refused to do. (R. 288.) That was the only demand ever made on respondent. It was the only demand refused. (R. 217, 218.) Wages, hours, and working conditions were never mentioned.

Thereupon the petitioners combined to force respondent to comply with their demands. Their purpose was to cause such injury to the respondent's business that she would be compelled to coerce her employees against their wills to appoint the petitioners' unions as their bargaining agents or, in the alternative, that she would be compelled to discharge her employees and replace them with members of the petitioners' unions. (R. 217, 218.)

(c) Petitioners' Attack upon Respondent Before the Temporary Order.

On October 4, 1937, the petitioners made their first show of force, calculated to intimidate the respondent, her employees and her customers. From fifty to seventy-five pickets congregated in front of respondent's restaurant. (R. 42.) There were forty or fifty pickets at noontime and from seventy to one hundred in the evening at dinner time, and such numbers were continued until the day of the temporary injunction. (R. 343.)

These pickets intimidated, frightened and assaulted respondent's employees, breaking the jaw of one so that he was laid up for seven weeks, and injuring another so that he was laid up a week. (R. 44.) They called the respondent's employees disgraceful names. (R. 289.) They carried banners, designating the respondent's restaurant as "unfair" and calling upon the public not to patronize it. (R. 78.) They used epithets of insult against the colored race to which several of respondent's employees belong. (R. 43.) In loud voices they called upon members of the public not to patronize respondent's restaurant. (R. 77.) They walked in a moving circle in front of the entrance and blocked it. (R. 76.) They stopped all deliveries of merchandise to respondent's restaurant (R. 351), and they made disparaging remarks about the respondent's food. (R. 385.)

On October 11, 1937 the Court of Common Pleas issued a temporary restraining order (with the consent of the petitioners), prohibiting violence, intimidation and mass picketing but permitting two pickets, all until final hearing.

(d) Petitioners Continued the Attack upon Respondent Even After the Temporary Order.

The violence, intimidation and threats, however, were continued by the defendants after and in violation of this temporary order. The pickets continued to call the respondent's employees vile names. (R. 77, 131.) Customers were threatened. (R. 112, 149.) Respondent's home was picketed during the night time. (R. 274.) Customers who drove to respondent's restaurant returned to their cars to find their tires punctured. (R. 221.) The homes of respondent's customers were stench bombed. (R. 117.) A dynamite bomb was set off in the yard of respondent's former residence, that address still appearing in the city directory. (R. 261.) Soon thereafter an attempt was made to dynamite respondent's present residence. (R. 258, 296.) Respondent's restaurant was stench bombed on two occasions. (R. 240.) The home of one of the employees was stench bombed. (R. 337.) A delivery driver was threatened and called obscene names. (R. 109.) A truck driven by a union truck driver who had made a delivery was seized and partially burned. (R. 165, 166.)

Each of respondent's employees renders his or her services pursuant to the terms of a renewable, written, three-month contract (R. 430), the validity of which was sustained by all the Ohio courts. (R. 432.)

By the attack, respondent's business was reduced 66⅔%. (R. 324.)

Petitioners specifically admit their purpose to continue their attacks against the respondent despite the contracts with the employees and unless restrained. (R. 217, 218.)

II.

SUMMARY OF ARGUMENT.

We respectfully submit that certiorari should be denied in this case for the following reasons:

A. No federal question was either presented to or decided by the state court.

B. The judgment of the state court is based on non-federal grounds adequate to support it, namely,

(1) That no legitimate trade dispute existed.

(2) That respondent's employees were bound by valid employment contracts.

(3) That the picketing was accompanied by excessive violence.

C. The federal question raised in this petition is not substantial, since the case turned on a point of local law as to which the state court's jurisdiction is paramount.

III.

ARGUMENT.

A. No Federal Question Was Either Presented to or Decided by the State Court.

Rule 38 adopted by this Court (Revised Rules, effective Feb. 27, 1939) embodies in it the ingredients which this Court has long deemed essential to the exercise of its jurisdiction to review state court decisions. The petition must show affirmatively, by specific reference to the record, that a federal question was presented for decision to the highest court of the state, that a decision of the federal question was necessary to the determination of the cause, and that the federal question was actually decided.

Lynch v. New York, 293 U. S. 52 (1934).

Rule 38 specifically requires, by reference to Rule 12, documented proof of the fulfillment of these requirements. The record here shows that the petitioners have failed to

satisfy these prerequisites in any respect whatever. The "Statement as to Jurisdiction" in the petition shows how the petitioners strained to meet the requirements and how signally they failed. Thus, they say that "with respect to the Federal question of free speech" the majority of the Ohio Supreme Court adopted language from an Illinois case which the petitioners quote and italicize. But a cursory examination of the Ohio majority opinion shows, beyond cavil, that the Illinois case was merely cited in support of the "generally accepted rule" (R. 433) against interference in the absence of a legitimate trade dispute. The majority opinion itself does not even mention free speech, nor does it make any reference whatever to the federal constitution.

Petitioners therefore resort to two separate dissenting opinions. Judge Day is quoted as declaring in his dissenting opinion that,

> "peaceful picketing * * * is * * * protected by the constitutional provision governing the exercise of free speech." (R. 434.)

Assuming that such a statement, without qualification as to the purpose sought to be ahieved or the truthfulness of the banners, is good law, it can be adequately rested on the state's own constitution (Art. I, Sec. 11, Ohio Constitution), without reference to the federal constitution. This Court has said that where a state constitution contains a clause similar to one in the federal constitution, a claim of right which does not specifically refer to the federal constitution is deemed to refer solely to the state constitution.

Gibbes v. Zimmerman, 290 U. S. 326, 328.

Judge Zimmerman is quoted by petitioners as saying in his dissenting opinion substantially the same thing as did Judge Day. But that against cannot be distorted into a positive statement by him that he rested his dissent on the federal constitution. He, too, fails to mention the fed-

eral constitution and he, too, could well have meant the state constitution. True, he cites *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 478, as an authority, but so far as appears, he is using the case merely as persuasive authority supporting a general statement of law and not as controlling authority compelling his decision. Moreover, his reference to "free speech" comes at the end of a long opinion in which he states, as the real ground for his dissent, his preference for the New York rule, which gives to the concept "labor dispute" a "broader and more comprehensive meaning than the one given it by the majority of this court." (R. 437.)

The paragraph in his dissenting opinion containing the reference to free speech is actually only a side remark showing the reasons given by *other courts* for denying injunctions. Thus, the paragraph starts with the clause, "The opinion has also been advanced" etc. (R. 439.)

Finally the petitioners list five cases ranging from *Insurance Co. vs. Cohen,* 234 U. S. 123 to *Carlson vs. California,* 84 L. Ed. (Adv.) 668, which, they say, "are believed to sustain jurisdiction." Apparently petitioners do not feel firmly entrenched in this belief. These cases announce a proposition that is no longer debatable, namely, that the "due process" clause of the Fourteenth Amendment affords protection against arbitrary abridgment of free speech by state governments similar to the protection given by the First Amendment against action of the federal government. These cases, however, do not dispense with the requirements of Rule 38.

The record here, therefore, establishes without possibility of contradiction that the federal question now asserted was neither raised nor decided at any stage of the proceedings. No reference to the federal constitution appears in any of the pleadings. (R. 1, 14, 17.) It does not appear in the petitioners' motion for new trial or in their notice of appeal. (R. 18.) No mention of it is contained in

the judgment of the trial court. (R. 20.) In his opening statement to the trial court petitioners' counsel expressly says that he claims the right to picket because of

> "the law as it is written definitely in and from this County and has never been repealed or amended in any other court decision." (R. 37.)

The judgment of the Court of Appeals contains no reference to the federal constitution. (R. 426.) The majority of the Ohio Supreme Court neither considers, nor discusses, nor decides any constitutional question. To the contrary, the majority opinion states the problem before it for consideration as follows:

> "The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute." (R. 432.)

What is more, the Ohio Supreme Court does not consider constitutional questions unless they are first submitted to or decided by the Court of Appeals.

Hoffman v. Staley, 92 O. S. 505 (1915).

The rule in Ohio is that the syllabus of the Supreme Court states the law of the case. Matters outside the syllabus are not regarded as decision, and expressions in an opinion of views on questions not contained in the syllabus are merely the personal opinion of the particular judge.

State ex rel. vs. Edmondson, 89 O. S. 93, 107, 105 N. E. 269 (1913);

Thackery v. Helfrich, 123 O. S. 334, 175 N. E. 449 (1931).

There is no syllabus in the instant case, but in the absence of a syllabus the points considered or decided are found in the headnotes. Here the headnotes read as follows:

> "Injunction—Labor Unions—Picketing and Boycotting Enjoined—No Legitimate Trade Dispute Existed." (R. 430.)

Not a word in the headnotes about the federal constitution or any federal question.

Finally, the two Illinois cases cited by petitioners, wherein this Court granted certiorari, afford petitioners no comfort. In each one it is apparent that the union specifically urged the Fourteenth Amendment in support of its claims and that the court expressly passed on the question adversely to the federal claim.

We therefore believe it to be conclusively demonstrated that the petitioners have failed to bring this case within Rule 38 and hence this Court has no jurisdiction to review the state court decision.

B. The Judgment of the State Court is Based on Non-Federal Grounds, Adequate to Support It.

(1) That No Legitimate Trade Dispute Existed.

It is well settled that even "where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain, this Court will not take jurisdiction."

Lynch vs. New York, 293 U. S. 52, 54.

It is the settled policy of this Court not to pass on constitutional questions that are not clearly necessary to a decision of the case.

Honeyman vs. Hannan, 300 U. S. 14.

This is not an action where there is uncertainty as to what the state court actually decided, nor have supervening changes occurred since the entry of the judgment. Cf. *Minnesota vs. National Tea Co.,* 84 L. Ed. (Adv.) 571 (1940). The Ohio court here explicitly assumed "the controlling question in the case" to be the determination of the state's common law on the point in controversy. It found, after a review of its own earlier decisions, and an examina-

tion of the treatment of that problem by other states, that "no legitimate trade dispute existed."

This Court has said that a decision of a state court restraining a union from placing complainant's company on an "unfair list" does not require any discussion of constitutional questions and does not raise any question of free speech,

> "but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words or signals, printed or spoken, caused or threatened irreparable damage."
>
> *Gompers vs. Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

We shall discuss more fully, under our next main heading, the proposition that the question presented here is essentially one of local law.

(2) That Respondent's Employees Were Bound by Valid Employment Contracts.

The Ohio Supreme Court said (R. 432):

> "The question as to the validity of the three month, written, renewable employment contracts here involved requires no discussion. Obviously the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record disclosed nothing tending to support the contention of the defendants to the contrary."

Plainly the petitioners' acts were calculated to interfere with the performance of the employees' contracts and to induce the breach thereof by the employees or by the employer. Petitioners' picketing, threats and violence, which coerced respondent's customers from patronizing her restaurant, were calculated to cause a breach of these employment contracts. Petitioners conceded that it was their purpose to coerce respondent into compelling her employees to designate the petitioners as their bargaining agents or to discharge and replace them with union members.

Under their contracts respondent's employees were free to join the unions or not to join them, but the contracts did not give respondent the right to coerce her employees into joining the union or into relinquishing their individual rights to bargain for themselves.

The petitioners had full notice of the existence of these contracts and are chargeable with the natural consequences of their acts. It is good common law in Ohio, as it is elsewhere, that it is illegal to persuade another to break a valid contract for a definite period of time.

LaFrance v. Electrical Workers, 108 O. S. 61, 94 (1923);

Hamilton Tailoring Co. vs. Joint Board, 132 O. S. 259.

Since the Ohio Supreme Court found these contracts valid, picketing calculated to induce a breach of these contracts was clearly aimed at an illegal objective and was therefore illegal.

(3) Picketing Was Accompanied by Excessive Violence.

The opinion of the Ohio Supreme Court (R. 431) reviews the history of the violence, threats and intimidation practiced upon the respondent, her employees and her customers. The record sustains the court's statement and the petitioners' connection with it, both before and after the preliminary restraining order, by the overwhelming evidence which we have documented in our statement of the case herein. That there was a threat of the continuation of such conduct is evidenced further by the fact that both the trial court (R. 20) and the Court of Appeals (R. 426) enjoined, among other things, assaults, disorderly conduct, intimidation, coercion, interference with deliveries, threats against persons dealing with respondent, and similar acts of molestation.

We therefore do not have here a case of general expressions of opinion or of mere dissemination of informa-

tion, but we have a long record of violence, coercion and intimidation accompanying the alleged dissemination of information, each forming an integral part of a course of illegal activities. The whole is so interwoven that any attempt to label part harmless and part coercive is doomed to failure. As Mr. Justice Holmes so aptly remarked in *Swift & Co. v. United States,* 196 U. S. 375,

> "It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan, and the plan may make the parts unlawful."

Under these circumstances even courts whose definition of a "labor dispute" the petitioners advocate and prefer to that of the Supreme Court of Ohio have consistently held that the privilege of picketing is lost by its abuse.

Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931).

And even the benefits of a special statute enacted to protect a union in the enjoyment of its right to peaceful picketing are thereby forfeited.

Busch Jewelry Co. vs. United Retail Employees Union, 281 N. Y. 150 (1939).

The judgment in the instant case can therefore be adequately supported on this clearly non-federal ground alone and one concurring judge expressly placed it on that ground, saying:

> "In respect to the plaintiff's place of business the defendants have therefore forfeited whatever rights they might otherwise have had peaceably to picket under the law. Rights peaceably exercised will be protected by the courts but such protection is forfeited when the attempted exercise thereof is accompanied by acts of violence as in the instant case." (R. 434.)

C. The Federal Question Raised in this Petition is Not Substantial, Since the Case Turned on a Point of Local Law as to Which the State Court's Jurisdiction is Paramount.

Even in the cases where this Court has discretion to grant certiorari, it will not grant a petition, though a state court may have decided a federal question, unless the question is one of substance not theretofore determined by this Court, or unless the state court's decision is not in accord with the applicable decisions of this Court. Rule 38 (5) (a). The Ohio court here decided a state, not a federal, question. Its decision is not at variance with the prior decisions of this Court and is in accord with the majority view of the courts of other states.

Petitioners' thesis appears to be that there is an absolute right to picket because there is an absolute right of free speech. This position finds no greater support in the authorities than an employer's position that he has an absolute right of property in his business. The decisions of this Court, that peaceful picketing may not be *forbidden* indiscriminately and under all circumstances, do not establish that it must be *permitted* indiscriminately and under all circumstances. These freedoms are not absolute but they are subject to restraint by the legitimate exercise of powers vested in state legislatures and courts. The question for determination is the extent of permissible exercise of these powers by such governmental bodies.

It has long been settled that one who intentionally injures another's business *prima facie* commits a tort. *A fortiori* is that true when several conspire to inflict damage because of their greater capacity for harm. To escape liability the petitioners must therefore justify by showing an over balancing public policy on their side. Failure to justify outlaws all means that they use to carry out their conspiracy, even those that are otherwise innocent or constitutionally protected. Mr. Justice Holmes stated the

principle clearly in *Aikens vs. Wisconsin,* 195 U. S. 194 (1904):

> "It would be impossible to hold that the liberty to combine to inflict such mischief even upon such intangibles as business or reputation was among the rights which the Fourteenth Amendment was intended to preserve. * * * No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

It is now generally accepted that the existence of a legitimate labor dispute justifies a union in the infliction of harm on an employer if lawful means are used. However, there is a wide disagreement among the various state courts in defining the legitimate objectives, in delimiting the area of conflict, and in designating who are strangers to the controversy and who are so closely related to it that they may lawfully be pulled into the arena.

Writers who considered the rationale of anti-injunction legislation posed the problem as follows:

> "It is an attempt to recognize frankly that the central problem of the law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of 'self-interest.'"
>
> *Frankfurter & Green, The Labor Injunction,* p. 215.

The choice of alternatives requires the weighing of the social and economic factors in the particular community. This function is best left to local tribunals. This Court has recognized that differences would develop among local tribunals and has honored such differences. In the words of Mr. Justice Brandeis' dissent in *Truax vs. Corrigan,* 257 U. S. 312, 354:

"What methods and means are permissible in this struggle of contending forces is determined in part by decisions of the courts, in part by acts of the legislatures. The rules governing the contest necessarily change from time to time. Future conditions change and, furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures, * * * the divergence of opinion in this difficult field of government action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal and thus close the door to experiment within the law. * * * Judges being thus called upon to exercise a quasi legislative function and weigh relative social values, naturally differ in their conclusions on such questions."

Mr. Justice Brandeis then used language advocating acceptance of the decision of the Supreme Court of Arizona which, in the converse, may well apply to our case. He said:

"In deciding these three points the Supreme Court of Arizona made a choice between well established precedents laid down on either side by some of the strongest courts in the country. Can this court say that thereby it deprived plaintiff of his property without due process of law? * * * A state * * * surely does not lack the power to select for its citizens that one of conflicting views on boycott by peaceful picketing which its legislature and highest court consider will best meet its conditions and secure the public welfare."

Once it has been determined by the proper court that the combat has left the confines of the permissible area, all means employed to carry it on may be properly forbidden. So this Court said in *Gompers vs. Bucks Stove and Range Co.*, 221 U. S. 418:

"But whatever the requirement of the proper jurisdiction as to the conditions on which the injunction against a boycott may be issued, when these facts exist, the strong current of authority is that publication

and use of such letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued and their use for such purpose may amount to a violation of the order of injunction."

Thus a strike "to collect a stale claim due to a fellow member of the union, who was formerly employed in the business, is not a permissible purpose" and a legislature may make such action punishable. Mr. Justice Brandeis said in that case:

> "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike."
>
> *Dorchy vs. Kansas,* 272 U. S. 306 (1926) annotated in 71 L. Ed. 248.

Even the New York courts that have established the widest boundaries for this area of conflict have concurred in the prohibition whenever the limits fixed by it have been transgressed.

Peaceful picketing was enjoined, though it was unaccompanied by violence or misstatements and despite a broad statutory definition of "labor dispute," where its purpose was to compel the complainant to hire help that he did not need.

> *Dubrow Pure Food, Inc. vs. Glazel,* 263 N. Y. 589, 189 N. E. 712 (1933);
>
> *Luft vs. Flove,* 270 N. Y. 390, 1 N. E. (2) 369 (1936);
>
> *Thompson vs. Boekhaut,* 273 N. Y. 390, 7 N. E. (2) 674 (1937).

Or where the purpose was to punish the complainant for employing a rival union.

> *Canepa vs. John Doe,* 277 N. Y. 52 (1938).

This Court has said that the states are free to broaden by statute the definition of a "labor dispute" beyond the meaning recognized at common law and to include persons who do not stand in the employer-employee relationship.

Senn vs. Tile Layers Protective Union, 301 U. S. 468 (1937);

Lauf vs. Shinner & Co., 303 U. S. 323 (1938).

Similarly this Court construed the Norris-LaGuardia Act as including racial controversy within the definition of "labor dispute,"

New Negro Alliance vs. Sanitary Grocery Co., Inc., 303 U. S. 552 (1938)

though the common law rule generally was that such controversies did not justify picketing. 48 *Harv. L. Rev.* 691 (1935).

But the *Senn* case (*supra*) expressly recognized that it was for the state to determine the lawfulness of the union's objectives. The court said,

> "Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth amendment does not prohibit it."

Apparently Wisconsin was not satisfied with the breadth of its original definition and therefore repealed the act and substituted a narrower definition of "labor dispute" requiring that it must be between an employer and a majority of his employees.

Ch. 57, Wisconsin Laws of 1939, effective May 4, 1939.

Thornhill vs. Alabama, 84 L. Ed. (Adv.) 659 and *Carlson vs. California,* 84 L. Ed. (Adv.) 668, disclose no intent on the part of this Court to change the foregoing well established rules. This Court has merely upset sweeping prohibitions against all forms of picketing regardless of their nature and purpose. It has ruled that peaceful picketing cannot be curtailed by a blanket prohibition under all circumstances, in vague and comprehensive legislation. The Alabama statute was condemned in the *Thornhill* case because it had to be "judged upon its face" • • •

since * * * "the courts below expressed no intention of narrowing the construction put upon the statute by prior state decisions." The Alabama courts had so construed and applied the statute that it left

> "room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the correctness of the terminology used in notifying the public of the facts of the dispute."

Likewise the California ordinance in the *Carlson* case was judged on its face and its terms were found so "sweeping and inexact" as to "disclose the threat to freedom of speech inherent in its existence." Neither on their facts nor in their language do these two cases exclude from the "allowable area of state control" the right of a state to adopt a reasonable definition of "labor dispute."

The Fourteenth Amendment is not a guarantee of untrammelled freedom of speech under all circumstances. The petitioner here would be the first to press this point if we were dealing with the constitutionality of the restraints imposed upon an employer's freedom of speech under the Wagner Act.

In our dual system of government this Court has indicated its purpose of leaving to local authorities matters of local concern and within local competence. Within large bounds the states are left free to develop their own ideas of government.

> "A prudent self restraint is called for at such times if state and national functions are to be maintained in stable equilibrium."
>
> *Hawks vs. Hamill*, 288 U. S. 52, 61 (1933).

The definitions of "boycott" and "labor dispute" have been part of the states' common law for many years. There is no greater need for uniformity in this field than in the many other fields where *Erie R. R. vs. Tompkins*, 304 U. S.

64, has created diversity even in the federal courts sitting in the various states. This Court has recently yielded to a state the determination of a question of title in the field of bankruptcy over which the federal courts are given exclusive jurisdiction.

> *Thompson vs. Magnolia Petroleum Co.*, 84 L. Ed. (Adv.) 624 (1940).

The petitioners in effect ask this Court to exercise coercion upon Ohio and other state courts to compel them to accept the New York definition of a "boycott" and a "labor dispute." This would be an invasion of the states' domain. This Court has said in *Erie R. R. vs. Tompkins, supra,*

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the Federal courts."

Will this Court then assume the power to do by decision what it has denied Congress to do by legislation?

Ohio's rule of decision in cases of this character was stated as follows in *LaFrance Co. vs. Electrical Workers,* 108 O. S. 61, 95 (1923):

> "Equality of justice demands that in any controversy the rights of all parties be scrupulously maintained. The right of workmen to be employed, irrespective of union membership, must be maintained; the right of employer to conduct his business without illegal interference must be upheld; and legal means employed *by strikers* must not be curtailed. Among the latter are the right of peaceful picketing, the peaceful persuasion of employes to terminate contracts at will, and the peaceful persuasion of expectant employes not to accept work with the employer in question." (Emphasis ours.)

This doctrine was reaffirmed in *State ex rel. vs. State Office Building Commission,* 125 O. S. 301, and it was followed in the instant case.

This delimitation of the area of struggle by the Ohio Court cannot be fairly characterized as obsolete or as based upon antiquated principles especially in the face of the attitude of a majority of recent decisions on this question. A recent Maine case re-examined the authorities of all the other states, expressly refused to follow the New York cases, and adopted the one now selected by Ohio as the more equitable one.

Keith Theatre vs. Vachon, 134 Me. 392 (1936).

See also

Muncie Building Trades Council vs. Umbarger, 17 N. E. (2) 829 (Ind. 1938);

Simon vs. Schwachman, 18 N. E. (2d) 1 (Mass. 1938);

Adams vs. Building Service Employees International Union, 84 Pac. (2) 1021 (Wash. 1938).

And the changes recently made by the many states who had experimented with broad anti-injunction statutes indicate a similar attitude. See Ch. 57, Wisconsin Laws of 1939; Ch. 440, Minnesota laws of 1939; the initiative petition adopted at a general election in Oregon on November 8, 1938. Even as advanced a thinker on labor problems as Mr. Madden, the present chairman of the National Labor Relations Board, stated in a public address in October, 1937 as follows:

> "If the great labor organizations desire to increase their membership by having employers force their employees into them against the employees' will, they must first, by repeal or amendment, cut the heart out of the National Labor Relations Act. For no Board which can read English and understand the purpose of this law can ever hold, under the present law, that the employer can choose the union for his employees."

Labor Relations Reference Manual, Vol. 1-A, pages 920, 926.

In view of the foregoing it certainly cannot be said that the ruling of the Ohio court is arbitrary or unreasonable. We therefore respectfully submit that the petition for a writ of certiorari should be denied both for want of jurisdiction and because the question presented is not a substantial federal question but turns completely on a point of local law as to which, according to prior decisions of this Court, the state court's jurisdiction is paramount.

Respectfully submitted,

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APPENDIX A.

Article I, Section 11, of The Constitution of the State of Ohio:

"§ 11. *Freedom of Speech; of the Press; of Libels.*

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."